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HAS CONGRESSIONAL OVERSIGHT OF INTELLIGENCE GONE TOO FAR

CORE COURSE III

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INTRODUCTION

In his last public appearance while in office, former Director of Central Intelligence Robert M. Gates went to uncharacteristic lengths in criticizing the growing intrusiveness of Congressional oversight on national intelligence functions.¹ Similarly, the two year tenure of his successor, R. James Woolsey, has been most notable for acrimony resulting from an ongoing public feud between Woolsey and Senator Dennis De Concini, Chairman of the Senate Select Committee on Intelligence, over a host of issues, including oversight. Many senior officials of the national security and intelligence communities approach relations with Congress adversarially, generally proceeding from the notion that intelligence is a function exclusive to the President and that the involvement of Congress should be limited to paying bills.

We will develop this relationship in the context of powers assigned under the Constitution of the United States to the Congress and the President. In the context of this discussion, intelligence activities are interpreted to mean those directed at agents or governments **outside** the United States, related specifically to key federal responsibilities of providing for common defense and conduct of foreign affairs. We are not talking here about gathering of information in support of domestic law enforcement -- an entirely separate, though no less controversial, Constitutional issue. Other Constitutional powers -- such as appropriation of funds and organization and staffing government activities -- play an integral role in execution of

intelligence activities; however, they are incidental to the primary competition over policy and will be incorporated as an adjunct to our main discussion.

After briefly reviewing what it is that Congress has done to generate criticism from the intelligence community, we must then answer questions investigating the hypothesis: Does the Constitution provide for a national foreign intelligence effort? Is intelligence an activity reserved exclusively for the President? What basis is there for this presumption? What basis is there for congressional involvement and what is the extent of that involvement? Is there credible evidence that they have -- in fact -- overstepped Constitutionally mandated separated powers, creating disequilibrium in the balance of power within government? Finally, and most importantly, is the national interest being best served under the current arrangement and what prospects are there for the future?

WHY IS GATES CONCERNED

Gates argues that legislative oversight has gone overboard. While acknowledging -- even encouraging -- Congressional interest, he noted that in 1992 members of the Intelligence Community were called up to meet more than 4000 times with representatives of the legislative branch, while the Community furnished over 50,000 documents and 1200 detailed responses to specific queries. The implication here is that at least some of this time would have been better spent managing work of the Intelligence Community. Gates further notes excessive scrutiny of the intelligence budget -- down to the level of individual items

--and the agonizingly inflexible process which Congress has created for reprogramming funds within the intelligence budget.² Even sources within the Legislative branch concur in Gates' assessment that Congressional overseers seldom have the time to develop expertise necessary to properly monitor complex intelligence problems.³ Gates is, in effect, saying that an oversight process has been created that is overly time consuming, detracts from Executive responsibilities to manage government effectively, and does not serve the national interest.

Woolsey has been less forceful in publicly articulating concerns about Congressional control over intelligence activities, but a great deal has found its way into public media. Much of his personalized conflict with Senator DeConcini stems from the concern of Woolsey and others that Congress is attempting to dictate the nature of post-Cold War intelligence policy under the guise of organizational restructuring. Similarly, Congressional demands for harsher disciplinary action against senior officials at the CIA in the wake of the Ames Spy scandal is viewed as unwarranted intrusion in an executive branch management function.⁴

The subject of covert intelligence operations continues to generate immense friction between the legislative and executive branches. Congressional authority, in effect, to "veto" executive action strikes at the heart of Constitutional struggle over separate powers.

CONSTITUTIONAL BASIS

The role of intelligence is to provide information to support the making of foreign policy and defense of the United States. It was recognized early on as a legitimate activity of government by Constitutional Framers such as John Jay.⁵ Even so, the Constitution of the United States makes no specific mention of power or authority for any branch of government to conduct intelligence activities. Lacking clear definition, the issue then becomes one of interpreting intent of the Framers in the areas of foreign affairs and national defense.

Constitutionally, the executive branch of government is empowered to negotiate treaties with foreign nations, and it is the President who serves as Commander-in-Chief of the armed forces. Clearly, however, these powers are tempered by the mandate that any negotiated treaty is ratified only after having obtained two-thirds majority support from the United States Senate. Furthermore, the Constitution is unambiguous in assigning the legislative branch power to declare war. While other express Constitutional powers -- such as the Congressional prerogative to appropriate funds for government operations -- significantly influence control and implementation of national intelligence activities, it is still clear that one will not find absolute resolution of the issue in the Constitution, itself. In fact, in the areas of foreign affairs and national defense, the Constitution speaks more in terms of what Louis Fisher characterizes as "separated" institutions "sharing" power rather than strictly "separate" powers within the government.⁶

Another critical consideration must be specific and implied oversight powers afforded the legislative branch in the Constitution, within the scheme of built-in checks and balances. Like the Presidential veto and judicial review, Congressional oversight was intended by the Framers to serve as an institutional check on the concentration of excessive power in the executive branch. Essentially, Congress is charged with ensuring that powers and projections of the Constitution and legislated statutes are carried out by the executive in the manner for which they were intended. In this, there is implied or express authority to review executive branch activity and, if necessary, propose changes. As such, it proves to be a very powerful tool in maintaining balance of power.

STATUTE AND PRECEDENT

Without clear Constitutional definition, one must look then to the body of law and precedent assembled over a 200 year period as a means of determining where authority resides to control national intelligence activities. As Harry Howe Ransom notes, the matter sparked little interest for the majority of that time -- legislation explicitly dealing with a national intelligence function did not appear until passage of the National Security Act of 1947.⁷ In the intervening period, intelligence gathering was generally viewed as an activity supporting military operations. The Executive branch -- in the President's capacity as Commander-in-Chief -- carried out intelligence activities largely unfettered for much of that period, given the historic reluctance of Congress to become involved in matters of war.

In the area of foreign affairs, a struggle for influence -- which Framers had intended under the doctrine of separate powers -- was far more evident. Only after the landmark Supreme Court decision of *U.S. vs Curtiss-Wright* (1936) were clear constitutional bounds established. Reflecting what Fisher characterizes as the extreme personal bias of Justice George Sutherland, the Court found that the President must be afforded "a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved".⁸ In so finding, the Court wrote that the President should be considered the "sole organ" of government responsible for conduct of foreign affairs. While not explicit in its treatment of intelligence activities, critical passages of the *Curtiss Wright* decision had the effect of isolating Congress from not just the execution -- but creation -- of national security policy for a majority of this century.⁹ Clearly, the United States exited World War II with the executive branch of government firmly, if not totally, in control over powers influencing intelligence activities.

Surprisingly, it was the executive branch, not the legislature, that finally initiated action to alter the status quo. Attempting to rectify shortcomings in the national military command structure identified during the War, the Truman Administration worked cooperatively to develop comprehensive legislation that centralized executive oversight of national security issues in the office of the President and consolidated control over military affairs in a single Department of Defense.

More pertinent to our discussion, the hallmark National Security Act of 1947 also consolidated various national foreign intelligence activities under a Director of Central Intelligence and created the Central Intelligence Agency as a clearinghouse for support to policymakers.

In establishing Constitutional responsibility, this event must be viewed as a watershed; intelligence activities were now formally recognized as part of the national security policy process and the legal status confirmed by the legislation now made these activities fair game for competition between the legislature and executive for control.

Ransom does a good job of identifying key developments in the struggle for control of intelligence activities since 1947.¹⁰ One current official of the Intelligence Community sees a pattern recurring over that period which has steadily eroded executive authority: the intelligence community -- largely acting at executive branch initiative -- undertakes activity outside its charter, these activities are found by the Courts to be of either questionable or unlawful nature, and Congress responds with a new round of legislation that increases its influence over future activity.¹¹

Unwarranted intrusion on the rights of American citizens by the executive branch during the Vietnam War era led in the mid-1970's to restrictive legislation on covert operations and communications monitoring. More importantly, the need for a

centralized, rigorous oversight effort within Congress was recognized, resulting in establishment of permanent committees within both Houses.

In the end, however, two hundred years of executive independence and benign neglect by Congress finally came to an end with passage of the Intelligence Oversight Act of 1980. In that restrictive legislation, the executive branch was directed to 1) keep Congress "fully and currently informed" of all intelligence activities; 2) notify Congress of all covert activities; 3) furnish "any information" that Congressional oversight committees requested; and 4) report to oversight committees in a "timely fashion" any and all illegal activities.¹² Additional restrictions on executive independence to fund intelligence operations were set in place following discovery of activities to subvert the Congressional appropriation process during investigation of Iran-Contra in the mid-1980's.¹³ None of these restrictions have been appealed to the Courts.

One can arguably say that the net effect has been redistribution of control over national foreign intelligence activities between the executive and legislative branches of government to a point of roughly equal proportion. Says Ransom, "For the most part, these developments have resulted from Congress' reassertion of responsibility for intelligence policy, organization, and operations".¹⁴

HAS CONGRESS GONE TOO FAR

Like a great many issues of politics and government, where you stand is a function of where you sit. The struggle for influence over national intelligence policy is either viewed as a healthy manifestation of inherent tensions built into our American brand of democracy, or as an unwarranted and politically motivated obstruction to effective and efficient management of government. We've already seen that officials of the executive branch believe that the pendulum has moved too far in favor of Congress. Not surprisingly, many associated with the legislative branch believe that the Constitutional issue is clear: Congress has not only the right, but the obligation, to act as a full partner in managing national intelligence activities. That authority is not diminished by a history of disengagement.¹⁵

Ground truth is probably somewhere in the middle. In determining where that middle ground lies and what this might hold for the future, one must consider several general issues that greatly influence intelligence activities. In the Constitutional realm, a basic conflict exists between the inherent secrecy of intelligence operations and demands for accountability in a democracy, naturally pitting the people's representatives (Congress) against central authority (the President). Ransom notes that the American system tolerates secrecy in the executive to a far greater degree when there is strong consensus between executive and legislative branches of government on foreign policy.¹⁶ If one accepts the notion that war is policy by other means, the theory then extends to the

entire range of national security issues. Ransom's theory continues with the observation that when consensus is lacking, strong motivation exists for Congress to reassert its claim to be consulted and play a role in managing intelligence activities.

Assuming the theory has some validity, what then are prospects for the balance of executive and legislative power in managing the nation's intelligence activities through the end of this century? One should not look for a period of great harmony. With demise of the Soviet empire, America has lost the single most unifying aspect of its foreign policy in this century. The nation is not of one mind regarding overseas priorities; cynics believe we lack an enemy around which to rally opposition. With primary emphasis on domestic concerns, it is highly unlikely that the Clinton Administration will take a lead -- as the executive branch must -- in creating a focused bipartisan blueprint for foreign affairs. Despite recent statements of renewed Presidential interest in intelligence affairs,¹⁷ there is little likelihood of substantive progress being made in such areas as restructuring of intelligence roles and missions due to the absence of consensus on foreign policy and institutional parity in controlling management of intelligence affairs. Priorities for the Intelligence Community will remain clouded, caught up in a broader argument over the changing nature of strategic interests and threats to the United States. Continued investment in an expensive technical intelligence infrastructure will become even more difficult.

For the foreseeable future, then, the "separate" branches of government will continue sharing power in an atmosphere of struggle and tension. It seems that this is just as the Framers of the Constitution intended.

1. Gates, Robert M., "American Intelligence and Congressional Oversight," (Remarks before the World Affairs Council of Boston, January 15, 1993) in U.S. Cong. Senate Select Committee on Intelligence, Legislative Oversight of Intelligence Activities: The U.S. Experience. (Washington, D.C., U.S. Government Printing Office, October 1994.) pp. 134-157.
2. U.S. Senate. pp. 140-141.
3. Interview with Kenneth Kodama, Senior Staff Member, House Permanent Select Committee on Intelligence. 1 December 1994.
4. Walter Pincus, "Woolsey Resigns From CIA After Troubled Tenure" in Washington Post. December 29, 1994. p. A-1.
5. Ransom, Harry Howe. "The Intelligence Function and the Constitution" in ARMED FORCES & SOCIETY, Vol.14, No. 1, Fall 1987. p. 46.
6. Fisher, Louis, THE POLITICS OF SHARED POWER- Congress and the Executive. (Washington, D.C.:Congressional Quarterly. Third Edition, 1993.) p. 1.
7. Ransom, p.45.
8. Fisher. p. 146.
9. Fisher. p. 147.
10. Ransom. pp. 47-51. Also see: U.S. Senate. pp. 2-26.
11. Interview with Assistant General Counsel, National Security Agency. 2 December 1994.
12. The Intelligence Oversight Act of 1980 has been incorporated into law as Title V of the National Security Act (50 U.S.C. 413). See: U.S. Congress, Compilation of Intelligence Laws and Related Laws and Executive Order of Interest to the National Intelligence Community. (Washington, D.C.: U.S. Government Printing Office, 1993.) pp. 19-24.
13. See Compilation of Intelligence Laws. pp. 22-24.
14. Ransom. p.51.
15. Interview with Mark M. Lowenthal, Senior Specialist in National Security Affairs, Congressional Research Service. 30 November 1994.
16. Ransom. p.43.
17. Pincus "Woolsey Resigns". p. A-6